

Order of Service; Directing Ds to file Disp. Motion
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claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

B. Plaintiff's Claims

Plaintiff alleges that CTF medical officials have failed to adequately treat the serious injuries he sustained while playing football. (Compl. at 3.) Plaintiff claims that Defendants Dr. Ahmed, his primary care physician, and Dr. J. Chudy, the chief medical officer at CTF, acted with deliberate indifference to his medical needs. Plaintiff claims that although his appeal remains pending, his circumstances warrant exemption at this time. Liberally construed, Plaintiff's claims are cognizable under § 1983 as a violation of the Eighth Amendment's proscription against deliberate indifference to serious medical needs.

Plaintiff names as defendant "R.N. 'Jerkey' (John Doe)" in his complaint. Although the use of "John Doe" to identify a defendant is not favored in the Ninth Circuit, see Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980); Wiltsie v. Cal. Dep't of Corrections, 406 F.2d 515, 518 (9th Cir. 1968), situations may arise where the identity of alleged defendants cannot be known prior to the filing of a complaint. In such circumstances, the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover their identities or that the complaint should be dismissed on other grounds. See Gillespie, 629 F.2d at 642; Velasquez v. Senko, 643 F. Supp. 1172, 1180 (N.D. Cal. 1986).

Accordingly, Defendant Nurse Doe is DISMISSED from this action. If through discovery Plaintiff is able to identify the unknown defendant, he may then motion the

1 Court for leave to amend to name the intended defendant and to issue summons upon
 2 him. See Gillespie, 629 F.2d at 642; Barsten v. Dep't of the Interior, 896 F.2d 422,
 3 423-24 (9th Cir. 1990).

4 5 CONCLUSION

6 For the reasons stated above, the Court orders as follows:

7 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
 8 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy
 9 of the complaint, all attachments thereto, and a copy of this order upon **Defendants Dr.**
 10 **Ahmed** and **Chief Medical Officer J. Chudy** at the **Correctional Training Facility in**
 11 **Soledad**, (P.O. Box 689, Soledad, CA 96960-0689).

12 Defendant Nurse John Doe is DISMISSED from this action without prejudice.
 13 The Clerk shall terminate this defendant from this action.

14 The Clerk of the Court shall also mail a courtesy copy of the complaint and a copy
 15 of this Order to the California Attorney General's Office. Additionally, the Clerk shall
 16 mail a copy of this Order to Plaintiff.

17 2. Each Defendant is cautioned that Rule 4 of the Federal Rules of Civil
 18 Procedure requires him to cooperate in saving unnecessary costs of service of the
 19 summons and complaint. Pursuant to Rule 4, if Defendant, after being notified of this
 20 action and asked by the Court, on behalf of Plaintiff, to waive service of the summons,
 21 fails to do so, he will be required to bear the cost of such service unless good cause shown
 22 for their failure to sign and return the waiver form. If service is waived, this action will
 23 proceed as if Defendant had been served on the date that the waiver is filed, except that
 24 pursuant to Rule 12(a)(1)(B), Defendant will not be required to serve and file an answer
 25 before **fifty-six (56) days** from the day on which the request for waiver was sent. (This
 26 allows a longer time to respond than would be required if formal service of summons is
 27 necessary.) Defendant is asked to read the statement set forth at the foot of the waiver
 28 form that more completely describes the duties of the parties with regard to waiver of

1 service of the summons. If service is waived after the date provided in the Notice but
 2 before Defendant has been personally served, the Answer shall be due **fifty-six (56) days**
 3 from the date on which the request for waiver was sent or **twenty-one (21) days** from the
 4 date the waiver form is filed, whichever is later.

5 3. No later than **fifty-six (56) days** from the date of this order, Defendants
 6 shall file a motion for summary judgment or other dispositive motion with respect to the
 7 claims in the complaint found to be cognizable above, or, within such time, notify the
 8 Court that Defendants are of the opinion that this case cannot be resolved by such a
 9 motion.

10 a. If Defendants elect to file a motion to dismiss on the grounds that
 11 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
 12 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
 13 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
 14 Terhune, 540 U.S. 810 (2003).

15 b. Any motion for summary judgment shall be supported by adequate
 16 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
 17 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
 18 **nor qualified immunity found, if material facts are in dispute. If Defendants are of**
 19 **the opinion that this case cannot be resolved by summary judgment, they shall so**
 20 **inform the Court prior to the date the summary judgment motion is due.**

21 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
 22 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
 23 motion is filed.

24 a. In the event Defendants file an unenumerated motion to dismiss
 25 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

26 _____
 27 ¹ The following notice is adapted from the summary judgment notice to be given to pro
 28 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
 See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 The Defendants have made a motion to dismiss pursuant to Rule
 2 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
 3 exhausted your administrative remedies. The motion will, if granted, result
 4 in the dismissal of your case. When a party you are suing makes a motion
 5 to dismiss for failure to exhaust, and that motion is properly supported by
 6 declarations (or other sworn testimony) and/or documents, you may not
 7 simply rely on what your complaint says. Instead, you must set out specific
 8 facts in declarations, depositions, answers to interrogatories, or documents,
 9 that contradict the facts shown in the Defendant's declarations and
 10 documents and show that you have in fact exhausted your claims. If you do
 11 not submit your own evidence in opposition, the motion to dismiss, if
 12 appropriate, may be granted and the case dismissed.

13 b. In the event Defendants file a motion for summary judgment, the
 14 Ninth Circuit has held that the following notice should be given to Plaintiff:

15 The defendants have made a motion for summary judgment by
 16 which they seek to have your case dismissed. A motion for summary
 17 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
 18 granted, end your case.

19 Rule 56 tells you what you must do in order to oppose a motion for
 20 summary judgment. Generally, summary judgment must be granted when
 21 there is no genuine issue of material fact--that is, if there is no real dispute
 22 about any fact that would affect the result of your case, the party who asked
 23 for summary judgment is entitled to judgment as a matter of law, which will
 24 end your case. When a party you are suing makes a motion for summary
 25 judgment that is properly supported by declarations (or other sworn
 26 testimony), you cannot simply rely on what your complaint says. Instead,
 27 you must set out specific facts in declarations, depositions, answers to
 28 interrogatories, or authenticated documents, as provided in Rule 56(e), that
 contradict the facts shown in the defendants' declarations and documents
 and show that there is a genuine issue of material fact for trial. If you do
 not submit your own evidence in opposition, summary judgment, if
 appropriate, may be entered against you. If summary judgment is granted
 in favor of defendants, your case will be dismissed and there will be no
 trial.

20 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

21 Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and
 22 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment
 23 must come forward with evidence showing triable issues of material fact on every
 24 essential element of his claim). Plaintiff is cautioned that failure to file an opposition to
 25 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
 26 the granting of the motion, and granting of judgment against plaintiff without a trial. See
 27 Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18
 28 F.3d 651, 653 (9th Cir. 1994).

1 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
2 Plaintiff's opposition is filed.

3 6. The motion shall be deemed submitted as of the date the reply brief is due.
4 No hearing will be held on the motion unless the Court so orders at a later date.

5 7. All communications by the Plaintiff with the Court must be served on
6 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
7 copy of the document to Defendants or Defendants' counsel.

8 8. Discovery may be taken in accordance with the Federal Rules of Civil
9 Procedure. No further Court order is required before the parties may conduct discovery.

10 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
11 Court informed of any change of address and must comply with the Court's orders in a
12 timely fashion. Failure to do so may result in the dismissal of this action for failure to
13 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

14
15 DATED: 6/27/2012



EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JULIO NORIGA,

Plaintiff,

v.

DR. AHMED, et al.,

Defendants.

Case Number: CV12-00889 EJD

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 6/27/2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Julio Noriga G25708
CTF State Prison
P. O. Box 705
Soledad, CA 93960

Dated: 6/27/2021

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk